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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 740

MARINA MERCANTE NICARAGUENSE, S.A., as owner of the Motor Vessel, "EL SALVADOR,"

Petitioner,

—v.—

McALLISTER BROTHERS, INC., as owner of the Tug "RUSSELL No. 18," VIRGINIA RUTH EVANS, THERESA F. SALVESEN and CATHERINE MARIE FARGO,

Respondents.

BRIEF OF RESPONDENT, VIRGINIA RUTH EVANS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE SECOND CIRCUIT

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McALLISTER BROTHERS, INC., as owner of the Tug "RUSSELL No. 18," VIRGINIA RUTH EVANS, THERESA F. SALVESEN and CATHERINE MARIE FARGO,

Respondents.

BRIEF OF RESPONDENT, VIRGINIA RUTH EVANS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of the Case

This case was tried without a jury before the learned Judge Edward Weinfeld in the United States District Court for the Southern District of New York for two and one-half weeks, ending June 2, 1965. The U. S. Court of Appeals affirmed the liability of petitioner but modified the damage awards to the three widows and children so that they were based on gross income of future lost earnings to dependents.

This action arose out of a disaster which occurred on September 20, 1962. The Tug RUSSELL #18, which had just assisted in undocking the M/V EL SALVADOR, sank in Port Elizabeth Channel, Newark, New Jersey, causing the death of three of her seven crew members, and thereby cutting off the financial support of three widows and nine minor children.

These are consolidated proceedings in which respondent McAllister Brothers, Inc. (hereafter referred to as "McAllister"), owner of the Tug RUSSELL #18, and petitioner Marina Mercante Nicaraguense, S. A. (hereafter referred to as "Marina"), owner of the M/V EL SALVADOR, sought exoneration from or limitation of liability. Representatives of the estates of the three deceased crew members are claimants in each proceeding and contest petitioners' limitation and exoneration pleas. In the trial and appellate court, each petitioner challenged the other's right to limitation, and each, in the event it was cast in liability to the death claimants, sought indemnity from the other; McAllister further is a claimant against Marina for damages to the Tug RUSSELL #18. The claimants had the burden of proof on the issue of liability, and when they sustained it, each vessel owner had the burden under its limitation plea of establishing that the faults or acts which resulted in liability were committed without its privity or knowledge. The learned trial court held both petitioners liable to the death claimants, but allowed each petitioner to limit its liability to the amount of its fund.

Much evidence was received from those who witnessed the capsizing and sinking. There was also offered evidence bearing on the stability of the Tug. There was the testimony of the diver who located the Tug at the bottom of the

Channel and found the body of Norman Evans caught in the outside port railing of the Tug. The deceased Evans had one of his legs caught in this railing. There was further testimony by the surveyors who had examined the Tug at dry dock after she was raised, one of whom, a marine architect, gave his opinion as to the cause of her foundering. Essentially, the principal issue was the cause or causes of the Tug's sudden sinking, in a matter of two or three minutes, with the resultant death of the three crew members in the quiet and calm waters of Port Elizabeth Channel, Newark, New Jersey.

This tragedy occurred in the darkness of the early morning hours at about 5:30 A.M. The Tug RUSSELL #18 had been engaged to assist the M/V EL SALVADOR from her berth at Pier 36 in Port Elizabeth, to Pier 3 in Brooklyn, New York. John Skogen, a harbor pilot employed by McAllister, was assigned to act as pilot for the trip.

The Tug RUSSELL #18 left Brooklyn at about 3:30 A.M. and proceeded to Port Elizabeth Channel where the M/V EL SALVADOR was docked. Those aboard the Tug were pilot Skogen, the three deceased, namely Norman Evans, Frank Fargo and Carl Salvesen, and the four surviving crew members. The approach to the pier where the M/V EL SALVADOR was berthed, was by way of Port Elizabeth Channel from its junction with Newark Bay Channel. As the Tug neared Port Elizabeth Channel, pilot Skogen sought, but was unable to locate a black buoy—black buoy can number 1—supposedly situated on the southerly side of the Channel at the junction. The pilot, not having located the black buoy, nevertheless entered Port Elizabeth Channel, guided by four red unlighted buoys to the Tug's starboard, numbered 2, 4, 6 and 8 respectively; the distance

between each buoy was about 900 feet. The distance from where the Tug entered the Channel to where the M/V EL SALVADOR was docked, at Pier 36, was about 3600 feet. The Channel is about 600 feet wide and dredged to a depth of 35 feet. The Tug reached the M/V EL SALVADOR about 5:00 A.M., whereupon Skogen left the Tug and boarded the M/V EL SALVADOR. Under Skogen's direction the M/V EL SALVADOR was maneuvered away from her berth without incident.

The ship, still under Skogen's direction, then executed a 90 degree port turn into Elizabeth Channel and headed toward the junction with Newark Bay Channel, which she would enter by a starboard turn on her planned passage to Brooklyn. The Tug RUSSELL #18 was tied to the left or port side of the M/V EL SALVADOR on a line 30 to 40 feet in length and made fast from the Tug's forward bitts to the M/V EL SALVADOR's cleat. As the Tug and ship proceeded toward the junction of the Channel, the bow of the Tug was abreast the side of the EL SALVADOR aft of the forecastle head, with the Tug's pilot house forward of the ship's bridge, and the Tug's stern about four feet away from the side of the ship. As the EL SALVADOR started to move down the straight-a-way of Port Elizabeth Channel, with the Tug RUSSELL #18 tied fast on her port side, Skogen, the pilot, positioned himself far out on the right or starboard wing of the ship's bridge, about 25 feet from the ship's steering wheel, to search in the darkness for the same black can, buoy #1, which he had not located when the Tug entered the Channel, and which Skogen believed now, on his return trip, was off the starboard side. The buoy was not on station on September 20, 1962, the fact of which Skogen was unaware until after the disaster. Skogen

intended to use the missing buoy as a guide to make the starboard turn into North Bay Channel. As he exited from Port Elizabeth Channel, the four red, unlighted can buoys were now on the port side in reverse order, numbered 8, 6, 4, and 2 respectively. Hansen, the master of the EL SALVADOR, was also on the starboard wing and the pilot's orders were transmitted by the master to the ship's engine room for execution. No one ordered the use of the ship's searchlights in the search for the missing black can buoy.

When the ship left the dock, Skogen ordered her engines put at slow head and then half ahead, because the engine was slow and sluggish; meanwhile the Tug's searchlights were played on red can buoy #8 and then on red can buoy #6, which was about 15 feet from the Tug's port side. When the EL SALVADOR was abreast of buoy #6, Skogen observed a tanker, assisted by two tugs, proceeding southerly down Newark Bay Channel toward the junction of the two channels, which he wanted to reach before the tanker and make his starboard turn. Although Skogen was still endeavoring to locate black can buoy #1, he ordered full speed ahead, giving the EL SALVADOR a speed through the channel water of about seven knots, or 8 miles an hour over the ground. Later Skogen ordered hard starboard, and upon the EL SALVADOR's master's instruction, the order was executed by the ship's wheelsman. No signal was given to the Tug to indicate change in speed or course.

At or about this time Forbes, the EL SALVADOR's boatswain, stationed at the port cleat to which the Tug RUSSELL #18's single line was made fast, saw the line under a heavy strain. He also observed the Tug listing heavily to port, water going over her, and several men on the bulwark of the Tug yelling excitedly. Although he said

he could not understand them, he sensed a situation of danger. Without giving notice to the bridge of the ship, and without orders from the bridge, Forbes, unable to release the line from the Tug to the EL SALVADOR because of the heavy strain, cut it with a knife. The Tug, cast adrift, still listing heavily to port and unable to keep pace with the ship, began to fall behind. As the Tug drifted astern, she was rubbing along the ship's side, taking water over her stern, sinking fast. When clear of the ship, she turned starboard, capsized, and soon went under, stern first, on her port beam to the starboard side of Elizabeth Channel.

Absolutely no rescue operations were undertaken by the EL SALVADOR's personnel; no life rings, jackets, or lines were thrown to the Tug or into the water; no lifeboats were launched and no lights were shown or flash dropped on the area where the Tug went down. A move by the boatswain to lower a Jacob's Ladder was futile, since the Tug had already drifted astern of the EL SALVADOR. Evans, Fargo and Salvesen were not seen alive after the sinking. The other crew members were rescued by other two Tugs which had been towing the tanker southerly down Newark Bay Channel.

Skogen, who had been far out on the starboard wing in his effort to locate the missing black buoy #1, first learned that the Tug #18 was in trouble, either from the EL SALVADOR's master, or from a whistle by the Tug. He started for the center of the ship's bridge, meanwhile giving orders to reduce speed—first, to half ahead, then to slow, finally to stop. When he saw the Tug, after she had been cast adrift, moving aft along the ship, Skogen ordered

the wheel hard left to avoid contact between the ship's propeller and the Tug.

While these events were taking place, Orville Evans, the chief engineer on the Tug, became aware of the trouble at his station in the engine room. After the undocking of the EL SALVADOR, as she and the Tug proceeded into Port Elizabeth Channel, the Tug developed a slight but noticeable port list. About 2 minutes later, when the Tug's engines were operating at full speed, Orville Evans heard a squealing noise. Upon inspection to ascertain the cause, hot oil squirted into his face. Because it was hot, Evans concluded it came from the steering mechanism. He next heard the engine straining or laboring, soon followed by water coming into the engine room over the lower half of a Dutch door. The Tug continued to list heavily to port and was going under. He made his escape from the engine room as the Tug was going down. The learned Trial Court was convinced that the straining of the Tug and the pressure in the steering system, which caused the oil to squirt in Evans' face, resulted from the application of an external force—contact of the Tug's rudder with the port bank of the Channel—in short that the Tug struck the bank immediately before she sank.

The learned Trial Court found a number of facts supported this finding. In addition to Evans' testimony, the survey made when the Tug was raised and in dry dock indicated that a tin can float gauge in the sump tank had been crushed; unchallenged is the testimony that only the application to the rudder of pressure from outside the vessel could have caused this. While petitioner Marina contended the Tug did not strike the bank, it failed to call any other

surveyors or experts who examined the Tug on its behalf. The Trial Judge held correctly that the unexplained failure by Marina to call the only expert witnesses who were in a position to challenge the testimony of the Tug's expert permits the inference that their testimony would corroborate his. The Trial Court found most credible and persuasive the testimony of Edward Ganly, the naval architect and marine surveyor, as to the Tug's physical condition during his several examinations of her in dry dock. Ganly found the Tug's rudder and steering gear in a hard to starboard position beyond their normal stops—a position into which they could not have been pushed, except by some external force—the same force which caused the hot oil to squirt in Evans' face and crushed the tin can float gauge in the sump tank. He also found damage to the Tug's clutch resulting from its slipping motion, which indicated that the "propeller itself was digging into the ground or bank against which the Tug was being forced." The port side of the rudder had a fracture of such nature as would have occurred by the Tug being dragged along the channel bank.

Marine surveyor Ganly also found mud on the Tug's propeller and on her rudder, 5 feet up on the port side, but only 2 feet 7 inches on the starboard side; mud, rust and scrapings were on her hull. This indicated contact with the ground. The learned Trial Judge held that Ganly's findings as to the mud on the propeller are particularly significant. Ganly's unchallenged opinion was that the mud got on the propeller while it was turning. Since the propeller stopped turning immediately before the Tug sank, the mud could not have come from that part of the channel bottom to which the Tug drifted to. This finds support in the fact that no mud was found on the propeller blade which was

closest to the bottom after the sinking and that the propeller, when first seen by the diver, was lying in the clear, open water, about 2 feet from the channel bottom. The Court held the evidence is convincing that the source of the mud was the channel bank.

The Trial Court correctly concluded that the ship by negligent acts and conduct, substantially contributed to the Tug's sinking, and bears responsibility for the casualty. The U. S. Court of Appeals affirmed this.

The deceased, Norman Evans, first assistant engineer aboard the Tug, was 28 years of age at the time of his death by drowning. His widow was also of the same youthful age. His life expectancy was 42.85 years and his wife's 48.55; their joint life expectancy was 38.12 years. Evans was in good health and was a steady worker. He had been employed as an assistant engineer aboard the Tugboat less than a year when he was drowned. Evans had been studying for and had intended to take the test for a chief engineer's license in the month following his death. This would have been the first month he would have become eligible to take the examination under the U. S. Coast Guard regulations. Evans was an accomplished and experienced mechanic who was able and had earned a living repairing cars and all mechanical appliances around the home. In addition he provided many other services for which his widow now has to pay, such as building a foundation for their home, building a large tool shed and mowing their extensive lawn.

Evans had obtained his job with McAllister Brothers on board their Tug, 8 months and 20 days before he was drowned. During this period his gross earnings were $7,611

or on a projected yearly basis at the rate of approximately $10,000 per annum. The Trial Court in projecting future lost earnings deducted annual federal and state income taxes amounting to $1,890 per year, and deducted the deceased's personal expenses at $1,100 annually, totalling $2,990 annually. After already deducting the income taxes and the deceased's annual expenses, the Trial Court held that only 50% of the remainder was available to the widow as future lost income. The stipulated value of the EL SALVADOR was $535,172. Thus, the petitioner's fund is in excess of the three death claimants' awards. The award to the widow Evans was computed after deducting for each year of their entire life expectancy future federal and state taxes; and making no allowance for the widow's "loss of inheritance" of the properties and sums her deceased husband would have accumulated if he had not been killed by petitioners' negligence and his life expectancy shortened by over 42 years.

Questions on Appeal

1. Is there evidence in the record to support the District Court's and the U. S. Court of Appeals' findings that Marina, as owner of the M/V EL SALVADOR, is liable in negligence to the death claimants?

2. Should the learned Trial Judge and United States Court of Appeals have awarded future loss of income to the widows and children on the basis of gross income?

POINT I

There is ample evidence in the trial record to support the decisions of the learned trial judge and the U. S. Court of Appeals that petitioner Marina Mercante Nicaraguense, as owner of the M/V EL SALVADOR, is liable to the widows and children of the three tug boat men killed in this occurrence as a result of petitioner's negligence.

As can readily be seen from the learned Judge Weinfeld's decision and the trial record, there is more than adequate evidence showing the liability of petitioner. The learned Trial Court correctly concluded that petitioner, by negligent acts and conduct, substantially contributed to the Tug's sinking, and bears responsibility for the three deaths.

The EL SALVADOR was found negligent in a number of respects. An outstanding negligent act was the cutting of the line by Forbes, the boatswain, without notifying the ship's bridge that the Tug was in difficulty, and when he was unaware of the cause of her listing and taking water over the aft port side. See *The Stirling Tomkins,* 56 F. 2d 740 (2 Cir.); *Commercial Molasses Corp.* v. *New York Tank Barge Corp.,* 314 U. S. 104, 62 S. St. 156, 86 L. Ed. 89. Negligent conduct is also attributable to the first mate of the ship, who likewise failed to report the Tug's plight to the ship's master and pilot for appropriate action before the line was severed. There can be little doubt as to what prudent seamanship required. The answer was given in testimony both by the pilot and the master. Skogen, the pilot, testified that had he been notified of the Tug's difficulty, he would have immediately stopped the ship, reversed

the engine, dropped the anchor, rendered all assistance to the Tug, and, if need be, beached the ship. *The Radnor,* 21 F. 2d 982 (D. C. Md.); *The Lizzi M. Walker,* 3 F. 2d 921 (4th Cir.). Hansen, the master of the EL SALVADOR, made if perfectly clear in his testimony that he would not have cut the line, but would have kept the Tug alongside, until he knew the cause of her listing and apparent sinking. *Commercial Molasses Corp.* v. *New York Tank Barge Corp., supra.* Even Forbes, the ship's boatswain, recognized his error when upon the trial he acknowledged that he did not know what caused the Tug to list, but assumed that when he cut the line the Tug would not sink, but would straighten up. He conceded that, had the Tug not been cast adrift, it would have been an easy matter to drop a Jacobs Ladder to enable the Tug's crew to leave the Tug in safety.

The petitioner is further chargeable with fault by reason of the negligent acts and conduct of pilot Skogen. See *The Sarnia,* 261 F. 900, 901 (2 Cir.); *The Coamo,* 267 F. 686, 688 (2 Cir.); *The Helen,* 5 F. 2d 54, 55, 56 (2 Cir.) 1924; *The Niels R. Finsen,* 52 F. 2d 795, 797-798 (S. D. N. Y.); see also the *W. L. Steed,* 79 F. 2d 2, 5 (2 Cir.), cert. denied *sub nom.* Skogen, while on the starboard wing, still searching in vain for black can buoy #1, ordered the EL SALVADOR as she passed red can buoy #6 on full ahead, so that with the Tug at her side, she attained in the darkness and in the narrow channel the speed of seven knots or eight m.p.h. over the ground. Under existing conditions, this speed in the narrow channel was excessive. *Atlee* v. *Packet Co.,* 21 Wall. 389, at 396, 397, 88 U. S. 389, at 396, 397, 22 L. Ed. 619. The speed caused the EL SALVADOR to pull the Tug RUSSELL #18 and to strain the line between the two vessels, which in turn caused the Tug RUSSELL #18

to list noticeably. The negligence of the order, executed without notice to the Tug, is emphasized by the fact that, when he gave it, Skogen did not know whether the Tug could keep pace with the full ahead speed of the ship. He did know, or should have known, that a tug being pulled too fast by a ship not only readily develops a list and takes water, but also is in danger of "tripping" or turning over in a narrow channel.

The Tug's difficulty was further compounded when Skogen, still not having located the missing black buoy, subsequently ordered a hard starboard turn to effect his entrance into Newark Bay Channel. Pilot Skogen admitted that he did not know the actual distance between the EL SALVADOR and the left or port bank of the Channel, and was not certain that the wheelsman was keeping to the course Skogen had set. The effect of this improvident order, again was without signal to the Tug, which caused the stern of the Tug RUSSELL #18, whose port side was in fact perilously close to the bank, to strike against the bank, and the resulting contact pushed the Tug's rudder starboard. Starboard rudder normally causes a tug to list to port; in this instance it so accentuated the already heavy port list that the Tug, which had only a one foot free board, took water immediately, capsized and sank quickly.

The petitioner Marina also is chargeable with the failure of Hansen, her master, to countermand Skogen's obviously improvident full speed and starboard order. *Ralli* v. *Troop*, 157 U. S. 386, 15 S. Ct. 657, 39 L. Ed. 742; *Union Shipping and Trading Co., Ltd.* v. *United States*, 2 Cir. 1942, 127 F. 2d 771. Master Hansen was on the EL SALVADOR's bridge during the undocking and subsequent passage down

Port Elizabeth Channel, and was aware that pilot Skogen gave the orders without being certain of the EL SALVADOR's course. Master Hansen had himself never looked to see if the EL SALVADOR was keeping to a proper course. Yet, when he received Skogen's full speed and starboard orders, he issued directions for the execution to his crew. Finally, the petitioner Marina is chargeable with two other negligent omissions. One was the failure to use the ship's searchlight to assist in looking for the missing black can buoy. Skogen admitted that if the light had been used, he would not have had to station himself far out on the starboard wing in vain search for the buoy, but could have remained at his normal station just outside the wheel-house. Petitioner Marina's other negligence was failure to use any of the EL SALVADOR's instruments to set and check her course; rather Pilot Skogen referred solely to shore lights, some of which he could not identify, and to the red can buoys, to which he admittedly did not know the distance. *The Arlington*, 19 F. 2d 285 (2 Cir.), 54 A. L. R. 101; *The S. W. Morris*, 59 F. 616 (S. D. N. Y.); *The West Erly*, 249 F. 938 (1st Cir.); *Convoy*, 12 F. 2d 93 (S. D. N. Y.).

POINT II

Damages for future lost contributions by decedents were correctly awarded to the three widows and children on the basis of gross income of the men killed. The Writ of Certiorari should be denied in all respects.

Petitioner does not cite one case in any circuit or in this Court to support its argument on the damages awarded the widows and children.

In the Court below, the claimants, on behalf of the three men killed in this occurrence, contended that their rights against petitioner Marina arise under New Jersey's Wrongful Death Act, N. J. Stat. Ann. Sections II A:31-1-2A:31-6, and that their rights against McAllister arise under the Jones Act, 46 U. S. C. Section 688. The two petitioners did not dispute that this be the applicable law. See *The Tungus* v. *Skovgaard*, 358 U. S. 588, 591 (1959); *Schiemann* v. *Grace Line, Inc.*, 269 F. 2d 596 (2d Cir. 1959); *Armit* v. *Loveland*, 115 F. 2d 308, 311, 313 (3d Cir. 1940). Under the New Jersey Act and the federal statutes, the applicable rule as to damages is primarily the same—the claimants may recover *all* their "pecuniary losses". See *Frazir* v. *Public Service Interstate Transportation Co.*, 254 F. 2d 132, 68 ALR 2d 1333 (2d Cir. 1958); *Michigan Cent. R. R.* v. *Vreeland*, 227 U. S. 59, 69-71 (1913); *Orona* v. *Isbrandtsen Co.*, 204 F. Supp. 777, 779 (S. D. N. Y. 1962), aff'd, 313 F. 2d 241 (2d Cir. 1963); *Odlivak* v. *Elliott*, 82 F. Supp. 607, 710 (D. Del. 1949); *Capone* v. *Norton*, N. J. 54, 83 A. 2d 710, 714 (1951).

From the personal injury cases dealing with the present topic it can be said that the more general view in the Fed-

eral and State Courts, supported directly or inferentially by a decided majority of the American cases, is that in fixing damages for accrued loss of earnings or the loss of future support, the income tax consequences should not be taken into consideration; on the contrary, the award should be based on the injured's gross earnings or earning capacity. 63 A. L. R. 2d 1393 at 1398 Sec. 4 (1959); *Stokes* v. *U. S.* (1944 C. A. 2 N. Y.), 144 F. 2d 82; *Chicago & N. W. R. Co.* v. *Curl* (1949 C. A. 8 Minn.), 178 F. 2d 497; *Runnels* v. *Douglas* (1954 D. C. Alaska); *Combs* v. *Chicago, S. & P. M. & O. R. Co.* (1955 D. C. Iowa), 135 F. Supp. 750; and citing other supporting cases from Alaska, Oregon, California, Georgia, Illinois, Indiana, Iowa, Minnesota, Missouri, New York, Ohio, Texas in A. L. R. 2nd *supra.*

Similarly, among death actions a majority of the cases support the view that in fixing damages for the destruction of decedent's earning capacity, the income tax consequences should not be taken into consideration. A. L. R. 2d 1400, *supra; N. Y. Cent. R. Co.* v. *Delich* (1958, C. A. 6 Ohio), 252 F. 2d 522; *Ill. Allendorf* v. *Elgin, J. & E. R. Co.* (1956), 8 Ill. 2d 164, 133 N. E. 288, cert. den. 352 U. S. 833, 12 Ed. 2d 53, 77 S. Ct. 219, reh. den. 352 U. S. 937, 1 L. Ed. 2d 170, 77 S. Ct. 219, and several other Illinois, Ohio and Texas cases supporting such, cited in A. L. R. 2d *supra,* 1400 ff.

The law was stated in the case of *McWeeney* v. *N. Y., N. H. & H. R. R.,* 282 F. 2d 34 (2d Cir.) cert. denied, 364 U. S. 870 (1960) with regard to damages for future loss of income in death cases. It was held in *McWeeney* that under federal law and under state death statutes where such state courts have been silent on the issue, that federal and state taxes on future income of the deceased should

not be deducted, and that therefore the gross income and not the net income after taxes should be the "measuring rod". There was only one exception specified with regard to this rule in that where the decedent had an extremely high annual average income, then these taxes would be deducted in determining the widows' judgment. As to what was an extremely high income, this would be left to the discretion of the trial court. This rule was followed and reiterated in the case of *Cunningham* v. *Rederiet Vindeggen A/S,* 333 F. 2d 308 (2d Cir. 1964), where it was held that the trial court should have used the gross earnings as its yardstick and not have deducted the federal and state taxes. In the case of *LeRoy* v. *Sabena Belgian World Airlines,* 344 F. 2d 266 (2d Cir. 1965) it was held that where the deceased would average $25,000.00 yearly for nine years of his work expectancy, and approximately $16,000.00 per year for several more years of his work expectancy, that this was the area of such a high income in which the trial judge was justified in deducting a total of 15% for federal and state taxes, and was a reasonable exercise of the trial court's discretion.

It is agreed by all parties to this case that under the New Jersey Wrongful Death Statute there is no authoritative decision rendered by that state, which has decided whether or not gross income should be the standard. See *Meehan* v. *Central R. R.,* 181 F. Supp. 594 (S. D. N. Y. 1960). In other words, the courts of New Jersey have been silent on this issue and, therefore, gross income should be the "measuring rod" when determining the future loss of earnings of the three widows and children, when applying New Jersey law.

It is further submitted that the cases of *Meehan* v. *Central R. R.*, 181 F. Supp. 594 (S. D. N. Y. 1960) and *O'Connor* v. *United States*, 269 F. 2d 578 (2d Cir. 1959) are not authority for holding that gross income should not be used because the *Meehan* case followed the *O'Connor* case as authority for doing such. However, if the *O'Connor* case, *supra*, is read carefully, it is clear that the court was applying Oklahoma law which state had clearly decided that the net income would be used when determining future loss of income. Thus, since Oklahoma was not silent on the issue, the federal court followed the state court's rulings.

The highest court in New Jersey has decided that *all* pecuniary injury, including loss of services of even minor children, are to be awarded in damages for wrongful death. See *McStay* v. *Przyzhozki*, 1951, 7 M. J. 456, 81, 82, 761. The *McStay* case was an action by Gertrud McStay as administratrix of the estates of Jennice McStay and Francis McStay, her minor sons, for wrongful death. The New Jersey Supreme Court held that *all* the pecuniary injury that the survivors, the mother and surviving brothers and sisters of the two deceased minor boys, may have sustained by reason of deprivation of the reasonable expectancy of contributions of a pecuniary nature and probable loss of direct services during their minority in and about the house, were proper elements of damage. See also *Carter* v. *West Jersey and Seashore R. R. Co.*, 76 M. J. L. 602, 71 A. 253, 19 L. R. A., N. S., 128 (E. A. 1908). In applying this rule, it was said in *Cooper* v. *Shore Electric Co.*, 63 N. J. L. 558, 567, 44 A. 633, 636 (E. & A. 1909):

> "With respect to the damages recoverable in such a suit, they are not such as arise from injury to the feelings,

> but are awarded in reference to a pecuniary loss, and in estimating damages the jury (sic, the fact finder) * * * must give compensation for pecuniary injury * * * not that the proof with respect to the personal injury need be such that the amounts of such damages may appear with exactness. If the evidence be such as to show a reasonable expectation of pecuniary advantage, the extinction of such an expectation by an act occasioning the death of the party from whom it arises will sustain the action, * * *"

Therefore, it was correct for the learned U. S. Court of Appeals to allow full damages to the three widows and children on the basis of gross income and certiorari should be denied in all respects.

CONCLUSION

The evidence is overwhelming against petitioner, Marina Mercante Nicaraguense, that it is liable to the widows and children for the drowning of their three young husbands and fathers in calm and untroubled waters. The decisions of the learned trial court and the U. S. Court of Appeals should be affirmed.

Death claimant Evans and the other widows and children's awards should be affirmed. For the above reasons, the liability of petitioner and the damages to the widows and children should be affirmed; and certiorari denied in all respects. Judgment should be entered forthwith for Death Claimants-Respondents. The widows and children

should not have to wait any longer than the present four years and 3 months to be compensated for the killing of their husbands and fathers.

Respectfully submitted,

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